SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 402

MAIN AND McKINNEY BUILDING COMPANY OF HOUSTON, TEXAS,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

To the Honorable Supreme Court of the United States:

Petitioner, Main and McKinney Building Company of Houston, Texas, respectfully presents the following brief in support of its petition for writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit:

I.

Opinions of Court Below.

The opinion of the Board of Tax Appeals in this case is unreported but appears in the record at pages 32-3; the opinion of the Circuit Court of Appeals is reported in 13 F. (2d) 81, and appears in the record at pages 42-44.

II.

Jurisdiction.

The jurisdiction of this Honorable Court was stated in the foregoing petition under subdivision III (pp. 7-9) and the statement thereof is here adopted and made a part of this brief.

III.

Statement of the Case.

The material facts have been stated in the preceding petition under subdivision I (pp. 1-5), and the statement thereof is here adopted and likewise made a part of this brief.

IV.

Specifications of Error.

1. The Circuit Court of Appeals erred in overruling the first ground of petitioner's motion for rehearing, which was:

> "Petitioner made the two $10,000 payments in question to Main Realty Company because petitioner and the Realty Company, in their sublease, considered the rental value of the property for the first twenty-five years to be $10,000 a year more than the annual rentals required in the original lease for the corresponding period, and they accordingly agreed and contracted that petitioner should pay the Realty Company $10,000 per year as "additional rent" during that period. Hence such payments were additional current rentals for the years in which they were paid, as expressly stipulated in the sublease; and the court therefore erred in holding that they were in effect advance rentals."

2. The Circuit Court of Appeals erred in overruling the second ground of petitioner's motion for rehearing, which was:

> "The court erred in holding that if the payments in question are to be considered current rentals, the

payment thereof entitled petitioner to the use of the premises for a period of seventy-three years "without paying any rent therefor;" on the contrary, petitioner was required to pay in that period a much larger annual rental than in any other, and in fact, was obligated to pay a rental of $45,000 per year for the last forty-nine years of the lease."

3. The Circuit Court of Appeals erred in overruling the third ground of petitioner's motion for rehearing, which was:

> "The court erred in overruling petitioner's Second Specification of Error, which was as follows:
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> 'The Board of Tax Appeals erred in holding that the $10,000.00 payments were capital investments and not deductible; said payments were not capital investments but were rent and deductible as such.' "

4. The Circuit Court of Appeals erred in overruling the fourth ground of petitioner's motion for rehearing, which was:

> "The Court erred in overruling petitioner's Third Specification of Error, which was as follows:
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> 'The Board of Tax Appeals erred in holding that it could not consider the fact that the Commissioner had allowed the $10,000.00 payments as operating expenses in each of the returns filed by Petitioner from 1926 to 1932, inclusive. Petitioner is not asserting an estoppel against the Government, but is contending that through these seven years the Commissioner, without interruption, placed the proper construction upon the contract.' "

V.

Points on Which the Petition for Writ of Error is Predicated (or Summary of the Argument).

First Point.

(Germane to the First and Third Specifications of Error.)

The decision of the Circuit Court of Appeals that the $10,000 payments in question are advance rentals, to be

treated, however, as though they were a part of the consideration for an assignment of the lease and not as rentals, is in conflict with the decision of the Supreme Court of Texas in the case of *Davis* v. *Vidal, supra.*

Second Point.

(Germane to the First Specification of Error.)

Petitioner and Main Realty Company in their sublease of March 12, 1926, considered the rental value of the property for the next twenty-five years to be $10,000 a year more than the annual rentals to be paid during the corresponding period by petitioner to Binz & Settegast under the original lease, and they accordingly agreed and contracted that petitioner should pay Main Realty Company $10,000 per year as "additional rent" during that period; hence such payments were not advance rentals, but were additional current rentals for the years in which they were paid, and were deductible as such.

Third Point.

(Germane to the First Specification of Error.)

There is no evidence whatever in the record of this case that the $10,000 payments in question were advance rentals.

Fourth Point.

(Germane to the Second Specification of Error.)

The error of the decision of the Circuit Court of Appeals is unmistakably revealed in its holding that "the error of petitioner's theory is made apparent" by the fact that if such theory were correct and the $10,000 payments constituted current rentals, then "the payment thereof at a specified rate entitled petitioner to the use of the premises for a period of seventy-three years without paying any rent

therefor"; on the contrary, petitioner is required in all events to pay in that period a much larger annual rental than in any other, and in fact, is obligated to pay a rental of $45,000 per year for the last forty-nine years thereof.

Fifth Point.

(Germane to the Fourth Specification of Error.)

Respondent allowed the $10,000 payments as annual rentals in each of the returns filed by petitioner from 1926 to 1932 inclusive; petitioner is not asserting an estoppel against the Government, but is contending that through these seven years respondent, without interruption, placed the proper construction on the contract of March 12, 1926, and the only construction of which it is susceptible.

VI.

ARGUMENT.

Argument Under First Point.

First Point Restated.

The decision of the Circuit Court of Appeals that the $10,000 payments in question are advance rentals, to be treated, however, as though they were a part of the consideration for an assignment of the lease and not as rentals, is in conflict with the decision of the Supreme Court of Texas in the case of *Davis* v. *Vidal, supra.*

Petitioner will endeavor not to repeat in this brief more than is necessary the facts stated and considered under the various subdivisions of the foregoing petition, but it may be desirable to restate some of them in the interest of clarity and continuity.

As previously stated, respondent contended in the hearing before the Board of Tax Appeals that the payments in

question were not rentals at all, that the contract of March 12, 1926 was not a sublease but was a sale or assignment, and that the payments were a part of the purchase price or consideration. The Board of Tax Appeals in its memorandum opinion sustained respondent's contention and held that the contract "was one of sale and was not a sublease" (R. 33).

No provision of a Federal taxing act is in dispute in this case; the problem is simply to determine whether the $10,000 annual payments were additional current rentals for the years in which they were paid.

The decision of the Board of Tax Appeals is squarely in conflict with the decision of the Supreme Court of Texas in Davis v. Vidal, supra. In that case, Antoinette W. Davis executed a lease on certain premises situated in the City of El Paso to the Dallas Brewery. Thereafter the Dallas Brewery executed an instrument transferring the *entire unexpired term* of the lease to Lou Vidal, in which instrument it was recited that "the Dallas Brewery does hereby sublet, assign and transfer the said above premises and does assign and transfer the above said lease, to the said Lou Vidal, * * *." In the above mentioned instrument, the Dallas Brewery, however, *reserved the right of re-entry* in event of Vidal's default in payment of the rent. Thus the instrument was identical in form and effect with the contract under consideration in the case at bar. Mrs. Davis then sued Vidal to recover the sum of $1200.00 alleged to be due her as rent for the use of the property. The "sole question" in the case, as stated by the court, was "whether a certain instrument of writing executed by the Dallas Brewery to the defendant, Vidal, on October 1, 1907, was an assignment of its lease from the plaintiff, Antoinette W. Davis, of date April 26, 1907, or a subletting of the premises in question." The court further stated that it was "aware that there is great conflict of authority upon this

subject, and that it would be futile to attempt to reconcile such conflict.'' In unmistakable language, the court held that the instrument in question was a sublease and not an assignment, because the right of re-entry was reserved, and thereupon affirmed the judgment of the lower court in favor of Vidal on the ground that there was no privity of contract as between him and Mrs. Davis. In so holding, the court said:

> ''In construing the effect of the foregoing instrument it is not conclusive as to its form, since it may be in form an assignment and yet be in effect a sublease. The question is one of law to be determined from the estate granted by the instrument. As a general proposition, if the instrument executed by the lessee conveys the entire term and thereby parts with all of the reversionary estate in the property, the instrument will be construed to be an assignment; *but if there remains a reversionary interest in the estate conveyed, the instrument is a sublease.* The relation of landlord and tenant is created alone by the existence of a reversionary interest in the landlord. * * *
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> * * *
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> ''We think it deducible from respectable authority that where the tenant reserves in the instrument giving possession to his transferee the right of re-entry to the premises demised, upon failure to pay rent, he necessarily retains a part of or an interest in the demised estate which may come back to him upon the happening of a contingency.
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> ''The instrument under consideration does not convey the entire estate received by the Dallas Brewery by its lease from Mrs. Davis, but retains by the right of possible re-entry a contingent reversionary interest in the premises. That the interest retained is a contingent reversionary interest does not, it seems to us, change the rule by which an assignment may be distinguished from a sublease. If by any limitation or condition in

> the conveyance the entire term, which embraces the estate conveyed in the contract of lease as well as the length of time for which the tenancy is created, may by construction be said not to have passed from the original tenant, but that a contingent reversionary estate is retained in the premises the subject of the reversion, *the instrument must be said to constitute a subletting and not an assignment.*" (Emphasis ours.)

It was provided in the contract of March 12, 1926, that in the event petitioner made default "in the payment of any monthly installment of rent when due, as in said lease provided (the original lease), or in any installment of *additional rent* (the $10,000 annual payments) as provided herein," or if it failed to discharge any other obligation it had assumed in said contract, then Main Realty Company would have the right to "re-enter the demised premises and take full and complete possession thereof and of the improvements upon the demised premises or any part thereof" (R. 16-7). Clearly, therefore, the contract was a sublease under the holding of the Supreme Court of Texas in the *Davis* case, *supra,* since the right of re-entry was reserved, and was not, as the Board of Tax Appeals held, a sale or assignment of the lease. The decisions of the Board of Tax Appeals and the Supreme Court of Texas on the question are in irreconcilable conflict. *This is material in that the Circuit Court of Appeals, as will be shown, in effect affirmed the decision of the Board of Tax Appeals on the same ground on which the Board rendered the decision.*

In the Circuit Court of Appeals, respondent when confronted with the *Davis* case, abandoned his original contention that the contract in question was a sale or assignment, and not a sublease. (The reason why this case was not presented in the Board of Tax Appeals by petitioner is mentioned at page 4 in the foregoing petition.) With reference to the *Davis* case, respondent, in the footnotes on pages 12 and 13 of his brief, said:

"* * * The rule followed by many, if not the majority, of the courts is that the mere reservation of a right of re-entry where the lessee has otherwise transferred the entire unexpired portion of the term does not constitute the retention of such a reversionary interest as will classify the transfer as a sublease. * * * (Citing cases.) *The rule seems, however, to be to the contrary in Texas.* Davis *v.* Vidal, 105 Tex. 444, 151 S. W. 290. * * *" (Emphasis ours.)

Respondent, upon abandoning his original theory, contended that the payments, if rentals, were advance rentals and should be treated the same as though they actually constituted the consideration for a sale or assignment of the lease, recoverable as such only by ratable deductions. The Circuit Court of Appeals in its opinion adopted this latter contention of respondent and held that the payments, if rentals, were advance rentals recoverable only by ratable deductions over the entire term of the lease (R. 43).

It now becomes material to examine the foundation of the decision of the Circuit Court, in order to determine whether that decision is in conflict with the decision of the Supreme Court of Texas in the *Davis* case. The only evidence before the Circuit Court at the time of its decision relating to the character of the payments in dispute was contained in the contract of March 12, 1926, and the original Binz & Settegast lease therein referred to. *Petitioner freely concedes that if there were anything in the contract or the original lease to support the view that the payments were advance rentals, the decision of the Circuit Court would not necessarily be in conflict with the Davis case.* But there is not a scintilla of evidence in those instruments, or elsewhere in the record, to support the theory that the payments were advance rentals.

Obviously then, by elimination only one basis for the decision remains; the Circuit Court held the payments were advance rentals in view of what it considered to be the legal

effect of the contract of March 12, 1926, because that contract vested in petitioner the title to the entire unexpired term of the lease. It is immaterial whether the payments be called advance rentals or consideration, if the ground of the decision be that the entire unexpired term of the lease was transferred; for in either event they will be accorded the same treatment and for the same reason. In such instances, terminology is always immaterial. Hence, *if the payments cannot be consideration, and indeed the Supreme Court of Texas has so held, then by the same token they cannot be advance rentals.*

In this view, as stated in the foregoing petition, *the Circuit Court affirmed the judgment on the same ground on which the case was decided by the Board of Tax Appeals,* to-wit, that where the entire unexpired term of a lease is transferred to another, the transaction is the equivalent of a sale or assignment and not a sublease, regardless of the agreement of the parties, or the terms of the instruments affecting the transaction, or any other fact or circumstance. This is directly contrary to the decision in the *Davis* case, and we therefore submit that the decision of the Circuit Court of Appeals herein is in conflict with the decision of the Supreme Court of Texas in that case.

Argument Under Second, Third and Fourth Points.

Second Point Restated.

Petitioner and Main Realty Company in their sublease of March 12, 1926, considered the rental value of the property for the next twenty-five years to be $10,000 a year more than the annual rentals to be paid during the corresponding period by petitioner to Binz & Settegast under the original lease, and they accordingly agreed and contracted that petitioner should pay Main Realty Company $10,000 per year as "additional rent" during that period; hence such payments were not advance rentals, but were additional current

rentals for the years in which they were paid, and were deductible as such.

Third Point Restated.

There is no evidence whatever in the record of this case that the $10,000 payments in question were advance rentals.

Fourth Point Restated.

The error of the decision of the Circuit Court of Appeals is unmistakably revealed in its holding that "the error of petitioner's theory is made apparent" by the fact that if such theory were correct and the $10,000 payments constituted current rentals, then "the payment thereof at a specified rate entitled petitioner to the use of the premises for a period of seventy-three years without paying any rent therefor"; on the contrary, petitioner is required in all events to pay in that period a much larger annual rental than in any other, and in fact, is obligated to pay a rental of $45,000 per year for the last forty-nine years thereof.

Even if it should be considered that the decision of the Circuit Court of Appeals is not in conflict with the decision of the Supreme Court of Texas in the *Davis* case, *supra,* the decision of the Circuit Court is palpably erroneous and should be reversed for the reasons hereinafter mentioned.

As previously stated, there is not a scintilla of evidence in the record of this case that the $10,000 payments in question were advance rentals. (See entire Stipulation of Facts, R. 23-27.) All of the evidence in the record relating to the character of such payments conclusively establish the fact that they were not advance rentals but additional current rentals.

The original lease executed by Binz & Settegast to Main Realty Company (R. 14) provides for the payment of rentals as follows: "$12,500 per year for the first and second years, beginning April 1, 1925; $25,000 per year for the next five years; $30,000 per year for the next eighteen years; $35,000 per year for the next twenty-five years; and $45,000

per year for the remaining forty-nine years of the lease term."

Petitioner agreed in its sublease from Main Realty Company "*to pay the rents* and all other payments, taxes, assessments, levies and governmental charges of all and every kind as specifically and generally set out and described *in the lease from Binz and Settegast*" and to pay to Grantor, *as additional rent,* and secured in like manner as is provided for security for rent under said lease, *the sum of ten thousand Dollars* ($10,000) *per year for twenty-five* (25) *years beginning September* 1st, 1926." (R. 15. Italics ours.)

Hence it is obvious that petitioner and Main Realty Company agreed substantially as follows: That petitioner would sublease the property from Main Realty Company and would pay to Binz & Settegast the rentals and other charges required in the original lease, and to Main Realty Company (a) the sum of $60,547.30 as a cash bonus to acquire the leasehold, and (b) additional annual rentals which, together with those to be paid Binz & Settegast, would equal the actual rental value of the property as redetermined and agreed upon for each respective year of the term. Petitioner and Main Realty Company then determined and agreed that the rental value of the property was $10,000 per year more for the first twenty-five years than was required to be paid during the corresponding period under the original lease, and that the rental value thereafter was equal to the rentals charged in the original lease. The sublease was accordingly drawn and executed in its present form.

The effect of the foregoing on the question at issue is conclusive, we believe, but an illustration may aid further in presenting and emphasizing the principle that is determinative of this controversy.

Assume that A leases certain property to B for a period of five years for an annual rental of $1000 per year; that

B agrees to sublease the property to C on condition that the latter will pay each year as rental the reappraised rental value of the property to be arrived at by agreement or in some stipulated manner; that B and C agree that the reappraised rental value of the property is $1000 for the first four years of the term, and $1500 for the last year; that B and C thereupon enter into an agreement of sublease wherein C agrees to pay to A as rental the sum of $1000 per year for the first four years, as provided in the original lease, and to pay as rental for the fifth year the sum of $1500, of which $1000 is to be paid to A and $500 to B. *Would the $500 paid to B be a part of the rent for the fifth and last year of the lease, or would it be advance rent, and if so, advance rent for what?*

Would it make any difference in the hypothetical case above assumed if B and C agreed that the reappraised rental value of the property was $1500 for the first year and $1000 for the remaining four years, instead of $1500 for the last year and $1000 for the first four years?

And would it make any difference if B and C agreed in consideration that the rental values would be redetermined conservatively, C would pay to B a cash bonus of $500 to acquire the lease in addition to paying the annual rental values of the property as redetermined, which were again determined to be $1500 for the first year and $1000 for the remaining four years? In this instance, the $500 bonus would, of course, be prorated over the five-year term of the lease and recovered by ratable deductions, while the $500 additional rental payment to B would be a part of the total sum of $1500 paid as rent by C for the first year of the term and would be deductible in its entirety as such. *This is our case; we submit the result is inescapable.*

The only case in point that we have been able to find after diligent search is that of *Boos Brothers Cafeteria*

Company, 25 B. T. A. 651. With reference to this case the author in Volume 1, Prentice-Hall Federal Tax Service, Par. 12014, has said:

> "Payments by Sublessee Held Deductible as Rentals.—Amounts paid monthly by a sublessee, held to be allowable deduction from petitioner's taxable income for the years involved in this proceeding.
>
> "Extract from Opinion: The Agreement through which the petitioner became a sublessee provides for three kinds of payments, viz. (1) a lump sum of $56,700 for the tangible property; assumption of the obligation to pay the rental of $2,100 per month reserved to the fee owner in the original lease; and (2) the payment of $2,200 per month to the lessees. We think it is perfectly clear that the latter payments must be regarded either as rentals deductible as ordinary and necessary expenses under Section 234(a) (1) of the Revenue Acts of 1924 and 1926 as and when paid or as a bonus ratably distributed over the terms of the sublease and recoverable tax free. J. Alland & Bro., Inc., 1 B. T. A. 631, Columbia Theatre Co., 3 B. T. A. 622. *On this issue the determination of the respondent is reversed* (Boos Brothers Cafeteria Co., 25 B. T. A. 651)." (Italics ours.)

In the *Boos Brothers* case, the petitioner acquired on May 5, 1924, a sublease on property in Los Angeles for approximately sixteen years, expiring May 31, 1940. In the sublease petitioner agreed to pay the rentals required in the original lease and agreed further to pay its sublessor a cash bonus on execution of the agreement and additional monthly rentals as therein provided. *Thus the obligations of the petitioner under its sublease were identical in form with those of the petitioner in the case at bar.* More specifically, the petitioner agreed to make the following payments *to its sublessor:* "On the execution of this agreement the sum of $56,700 through escrow; on the 1st

day of June, 1924, the sum of $2,200; and the sum of $2,200 of the first day of each calendar month thereafter up to and including the 1st day of May, 1935; and the sum of $2,000 on the first day of each calendar month thereafter to and including the 1st day of May, 1940." In its income tax returns for 1924, 1925 and 1926, petitioner "deducted the respective amounts of $15,400, $26,400 and $26,400 from its gross income for each of such years as rental under the terms of its sublease agreement." The amounts so deducted are the exact amounts in full that petitioner paid its sublessor during the three years respectively in question. The Commissioner contended that the amounts in dispute, deducted as above mentioned, represented the cost of goodwill acquired by petitioner through the sublease. On this issue the Board of Tax Appeals reversed the determination of the Commissioner and thereby affirmed the right of the petitioner to deduct the full amount of the payments during the years they were made, as current rentals. In its opinion the Board said:

> "The respondent has disallowed the deduction claimed on account of the annual payments under the terms of the agreement through which petitioner obtained a lease on premises at 522-534 Hill Street, Los Angeles, on the theory that such amounts represented the purchase price of good will and, therefore, were capital investments. Upon the record we are convinced that no good will was acquired in the transaction. Petitioner's sole object was to secure a suitable location for a branch of its own business. * * * *The payments in question must be regarded either as capital cost of the lease or as rentals for the premises.*
>
> "The Agreement through which the petitioner became a sublessee provides for three kinds of payments, viz. (1) a lump sum of $56,760 for the tangible property; assumption of the obligation to pay the rental of

$2,100 per month reserved to the fee owner in the original lease; and (2) the payment of $2,200 per month to the lessees. We think it is perfectly clear that the latter payments must be regarded either as rentals deductible as ordinary and necessary expenses under Section 234(a)(1) of the Revenue Acts of 1924 and 1926 as and when paid or as a bonus ratable distributed over the terms of the sublease and recoverable tax free. J. Alland & Bro., Inc., 1 B. T. A. 631, Columbia Theatre Co., 3 B. T. A. 622. *On this issue the determination of the respondent is reversed.*" (Italics ours.)

The judgment in the *Boos Brothers* case is well considered; it comports with sound principle and common sense and there is no occasion whatever to overrule it. We submit the judgment therein and the principle on which it rests should be determinative of this controversy.

The case of *J. Alland & Bro., Inc.,* B. T. A. 631, cited by the Board of Tax Appeals in the *Boos Brothers* case, not in support of its judgment but as illustrative of the rule mentioned therein, is not in point with the instant case. The *Alland* case was cited and relied on by the respondent herein as *J. Alland & Bro., Inc.,* v. *United States,* 28 F. (2d) 792, and as such was cited by the Circuit Court of Appeals in its opinion. In that case the taxpayer acquired a lease on property in Boston by assignment on November 11, 1921, from Carmen Specialty Shoe Shop, Inc., "for a term of three years and two months *from January 1, 1922.*" All rental and other obligations under the original lease were assumed by the taxpayer and the latter in addition agreed to pay the Specialty Shop the sum of $18,000, of which $1,000 was paid in cash and $9,500 was paid on December 29, 1921; the balance of $7,500 was evidenced by certain notes. *The taxpayer did not have possession, or any right to possession of the property during 1921, the year in which the $10,500 payment in contro-*

versy was made and deducted. Clearly the payment could not be considered as rent for 1921 under such circumstances. The Board of Tax Appeals in its opinion said:

> "The essence of its contention (the taxpayer's) is that any amount which a taxpayer may pay for a right to the possession of property *even in a future year* is deductible from gross income. (Italics Court's.)
>
> "We do not think that this construction of the statute is the correct one. * * * The taxpayer cannot logically claim that the $10,500 in question was paid as a condition to the continued possession of property, *inasmuch as it had no possession of the premises at 126-A Tremont Street during the year 1921.*" (Italics ours.)

Thus it is obvious that the *Alland* case has no application to the case at bar. In Columbia Theatre Company, 3 B. T. A. 622, cited by the Board of Tax Appeals in the *Boos Brothers* case for the same purpose that the *Alland* case was cited, the Board simply held that "any expenditures, in the way of cost or bonus, incurred in connection with its acquisition, should be capitalized and exhausted ratably over the term of the lease. This, of course, is a correct statement of the law but does not relate to the point at issue in the instant case.

Sound principle and precedent have established conclusively, and heretofore without dissent from any source, that where, as here, a sublessee assumes the rentals in the original lease and pays his sublessor, pursuant to a reappraisal or other agreement, additional rentals which, together with the rentals required in the original lease, will equal the actual reappraised rental value of the property for each respective year, such additional rentals are not advance rentals but are current rentals and deductible as such in the year they are paid.

Every case cited by the Circuit Court of Appeals in its opinion herein and by the respondent in this connection,

except the *Alland* case, *supra,* and the *Miller & Vidor* case, *infra,* involve what was *admittedly* either a bonus, an advance rental, or fees or other expenses paid to acquire a lease. *In all of these cases the decisions are entirely correct, but are not in point for the reasons mentioned.*

The *Alland* case, *supra,* as above noted, involved a payment made before the taxpayer acquired possession of the property, which obviously could not be considered as current rental for the year during which it was paid.

That *Miller & Vidor Lumber Company* v. *Commissioner,* 39 F. (2d) 890, is not applicable to any issue in the instant case is made evident by the following brief quotation from the opinion:

> "This is an appeal from the Board of Tax Appeals, *and presents a single question,* whether petitioner (the taxpayer), using the accrual method of computing net income, is entitled to deduct in 1920, interest paid during that year, which accrued in prior years on its obligations.* * * (Italics ours.)

Important, controlling facts have not been considered by the Circuit Court of Appeals. That court in its opinion stated that "the error of petitioner's theory is made apparent" by the fact that if such theory were correct and the $10,000 payments constituted current rentals, then "the payment thereof at a specified rate entitled the petitioner to the use of the premises for a period of seventy-three years without paying any rent therefor." *With all deference, petitioner says that such a statement instead of revealing "the error of petitioner's theory" reveals unmistakably the error of the Circuit Court's decision.* Petitioner will not under any theory obtain free rent "for a period of seventy-three years"; on the contrary, petitioner is required in all events to pay in that period a much larger annual rental than in any other, and in fact is obligated to pay a rental of $45,000 a year for the last forty-nine years thereof.

Argument Under Fifth Point.

Fifth Point Restated.

Respondent allowed the $10,000 payments as annual rentals in each of the returns filed by petitioner from 1926 to 1932, inclusive; petitioner is not asserting an estoppel against the Government, but is contending that through these seven years respondent, without interruption, placed the proper construction on the contract of March 12, 1926, and the only construction of which it is susceptible.

Petitioner deducted the annual rental of $10,000 in each of its tax returns from 1926 to 1932 inclusive, as "rent on business property", and respondent allowed such deductions (R. 26). Petitioner is not asserting an estoppel against the Government, but is contending that respondent by allowing the deductions for seven consecutive years, with full knowledge of the facts, placed the proper construction on the contract of March 12, 1926, and the only construction of which it is susceptible.

Wherefore, premises considered, petitioner prays that this Honorable Court will grant a writ of certiorari herein and thereafter reverse the judgment of the Circuit Court of Appeals.

Respectfully submitted,

Edward S. Boyles,
Attorney for Petitioner.

Willard L. Russell,
Of Counsel.